



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 14, 1996

Ms. Susan E. Tennyson
Supervising Attorney, Litigation Section
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR96-0189

Dear Ms. Tennyson:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 27580.¹

The Texas Department of Health (the "department") received several requests for information concerning Nature's Nutrition Formula One ("Formula One"), a product that was distributed by Alliance USA. You state that the department has already publicly disclosed certain press releases, administrative orders, and other miscellaneous documents.² You contend that other information responsive to the requests is excepted from disclosure.

You argue that information relating to injuries allegedly arising from the use of Formula One is confidential pursuant to the Texas Medical Practice Act (the "MPA"), V.T.C.S. art. 4495b. Section 5.08(b) of the MPA provides:

¹We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon) (codified as amendments to Gov't Code ch. 552). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon). A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

²We note that one of the documents sent to this office appears to be a public announcement by the department that apparently was sent for informational purposes. We assume that copies were released to the requestors.

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Section 5.08 prohibits the release of medical records except in accordance with the procedures outlined in the MPA. Open Records Decision No. 598 (1991) at 2-4. You have submitted to this office for review a representative sample of the department's records concerning allegations of injuries. We agree that most of the records are medical records that may not be publicly released.³ However, some of the records do not appear to have been created or maintained by or under the direction of a physician. Such records are not made confidential by the MPA and must be released.⁴

You also contend that certain documents obtained from the Federal Food and Drug Administration (the "FDA") are made confidential pursuant to federal law. You indicate that the FDA limited access to these documents to department employees who are also commissioned as officers of the United States Department of Health and Human Services. The department was informed by the FDA that these officers and the department are prohibited from releasing the documents pursuant to section 331(j), title 21, and section 1905, title 18, of the United States Code.⁵ These provisions prohibit the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. You also refer to section 20.85, title 21, of the Code of Federal Regulations which states:

Any Food and Drug Administration records otherwise exempt from public disclosure may be disclosed to other Federal government departments and agencies, except that trade secrets and confidential commercial or financial information prohibited by 21 U.S.C. 331(j), 42 U.S.C. 263g(d) and 42 U.S.C. 263i(e) may be released only as

³In reaching our conclusion here, we assume that the representative samples of medical records submitted to this office are truly representative of the records requested as a whole. See Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted).

⁴You state that the records submitted to this office are only a small portion of the records that have medical information. If you believe some of the information in records not protected by the MPA is otherwise confidential, that information should be clearly marked and submitted to this office for review. We have marked the records submitted to this office to indicate what must be disclosed.

⁵It is not clear in what capacity these employees reviewed the documents. If the documents were reviewed only in their capacity as federal officers, it is not apparent that the department had access to the documents. Open Records Decision No. 561 (1990) at 9 (governmental body is not required to obtain information it does not have to comply with an open records request).

provided by those sections. Any disclosure under this section shall be pursuant to a written agreement that the record shall not be further disclosed by the other department or agency except with the written permission of the Food and Drug Administration.

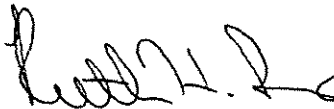
If information is made confidential under federal law, it is excepted from disclosure under Chapter 552. Open Records Decision No. 561 (1990).

The department originally contended that other documents responsive to the requests were excepted from disclosure pursuant to section 552.103(a), which provides an exception for information related to pending litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. However, you have informed this office that the litigation has concluded. Thus, section 552.103(a) is not applicable to the records at issue.⁶

You also asserted that some of the documents at issue are protected from disclosure pursuant to section 552.107(1). Section 552.107(1) excepts from required public disclosure information that is within the attorney-client privilege, but only to the extent that it discloses confidences of governmental representatives or reveals the attorney's legal advice, opinion, and recommendations. *See* Open Records Decision No. 574 (1990). We have marked the information that may be withheld from disclosure under section 552.107(1).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 25375

⁶We note that an attorney's work product is one aspect of the section 552.103(a) exception, and may be protected from disclosure as it relates to pending or anticipated litigation. However, section 552.103(a) is inapplicable in this situation.

Enclosures: Submitted documents

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